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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

|                    |   |                           |
|--------------------|---|---------------------------|
| JAMES D. MIMS,     | ) | CV 08-08341-SVW (DTB)     |
|                    | ) |                           |
| Petitioner,        | ) | ORDER ADOPTING FINDINGS,  |
|                    | ) | CONCLUSIONS AND           |
| v.                 | ) | RECOMMENDATIONS OF UNITED |
|                    | ) | STATES MAGISTRATE JUDGE   |
| J. WALKER, Warden, | ) |                           |
|                    | ) |                           |
| Respondent.        | ) |                           |
| _____              | ) |                           |

Pursuant to 28 U.S.C. § 636, the Court has examined the Petition, all the records and files herein, the Magistrate Judge's Report and Recommendation, and the Objections to the Report and Recommendation. Having made a *de novo* determination of the portions of the Report and Recommendation to which the Objections were directed, the Court concurs with and adopts the findings, conclusions and recommendations of the Magistrate Judge.

The Court notes that Petitioner raises two new arguments in his Objections to the Report and Recommendation that were not included in his Petition. These claims are for insufficiency of the evidence and failure to instruct on a lesser included offense. (Objections at 11-

1 13.) For the reasons stated below, these additional claims do not  
2 affect the dismissal of the Petition.

3 "Before a federal court may grant habeas relief to a state  
4 prisoner, the prisoner must exhaust his remedies in state court."  
5 O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). In order to fully  
6 exhaust his state court remedies, a prisoner "must fairly present all  
7 of his claims to the highest state court." Carter v. Giurbino, 385  
8 F.3d 1194, 1196 (9th Cir. 2004). Here, Petitioner has not presented  
9 his additional claims to the California Supreme Court. Therefore, even  
10 if the Court were to consider these claims that were raised for the  
11 first time in his Objections, see Brown v. Roe, 279 F.3d 742, 745 (9th  
12 Cir. 2002), the claims must be rejected as unexhausted.

13 Furthermore, Petitioner cannot prevail on the merits of these  
14 additional claims. In order to prevail on a claim of insufficiency of  
15 the evidence, Petitioner must show that, viewing the evidence in the  
16 light most favorable to the prosecution, no rational trier of fact  
17 could have found the essential elements of a crime beyond a reasonable  
18 doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). In habeas  
19 corpus cases, there is another layer of deference, requiring a showing  
20 that the state court decision was an unreasonable application of the  
21 Jackson standard. Juan H. v. Allen, 408 F.3d 1262, 1274-75 (9th Cir.  
22 2005). Petitioner cannot meet that burden here, where there was direct  
23 testimony from the victim that he found Petitioner in his apartment.

24 With respect to the jury instructions, "[i]t is well established  
25 that a criminal defendant is entitled to adequate instructions on the  
26 defense theory of the case." Conde v. Henry, 198 F.3d 734, 739 (9th  
27 Cir. 1999). A federal court, however, may not grant habeas relief  
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1 unless the error had a "substantial and injurious effect or influence  
2 in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S.  
3 619, 623 (1993). In his Objections, Petitioner argues that there was  
4 no evidence of his intent to permanently deprive the owner of his  
5 property and that the trial court should have instructed the jury with  
6 the lesser included offense of attempted burglary. Petitioner claims  
7 "the owner of the contested property never testified that petitioner  
8 intended to deprive him of said property, nor was there any evidence  
9 that petitioner removed said property from the residence." (Objections  
10 at 13.)

11 Petitioner's argument is incorrect for a number of reasons.  
12 First, it was not necessary for the owner of the property to testify as  
13 to Petitioner's intent in order for the jury to find intent. "The jury  
14 may infer a defendant's specific intent to commit a crime from all of  
15 the facts and circumstances shown by the evidence." People v.  
16 Lindberg, 45 Cal. 4th 1, 27 (2008). Second, it was not necessary for  
17 Petitioner to have removed any property from the premises. In  
18 California, "the crime of burglary, unlike robbery, does not include  
19 asportation as one of its elements." People v. Joiner, 84 Cal. App.  
20 4th 946, 968 (Ct. App. 2000). Third, an instruction on attempted  
21 burglary would not be appropriate if there were weak evidence of intent  
22 to steal. Attempted burglary requires a "specific intent to commit a  
23 crime, and a direct but ineffectual act done toward its commission."  
24 People v. Prince, 40 Cal. 4th 1179, 1256 (2007) (quoting Cal. Penal  
25 Code § 21(a)). Burglary itself requires entry into a home "with the  
26 intent to commit grand or petit larceny or any felony." Id. (quoting  
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1 Cal. Penal Code § 459). Thus, attempted burglary requires the same  
2 intent to steal that burglary does.

3 Even if the Court were to address these additional claims,  
4 Petitioner has made no showing whatsoever that the failure to instruct  
5 resulted in a substantial and injurious effect on the jury's verdict.  
6 In addition, had Petitioner attempted to make such a showing, it would  
7 fail on the merits. The jury was presented with sufficient evidence on  
8 which to convict Petitioner of burglary. The trial court did not  
9 determine that the facts warranted an instruction on attempted  
10 burglary. Nor did Petitioner's testimony at trial-that he does not  
11 even remember being in the apartment-support a theory of attempted  
12 burglary. Therefore, habeas relief is inappropriate.

13 Accordingly, IT IS ORDERED that Judgment shall be entered  
14 dismissing the action with prejudice, and the Clerk shall serve copies  
15 of this Order and the Judgment herein on the parties.

16  
17 IT IS SO ORDERED.

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20 DATED: April 20, 2010



21 STEPHEN V. WILSON

22 UNITED STATES DISTRICT JUDGE  
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